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No. _____

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1984

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HARVEY D. HOLLOWAY,

Petitioner

vs.

STATE OF ALABAMA,

Respondent

* * * * * * * * * * * * * * * * * * * *

PETITION FOR A WRIT OF
CERTIORARI TO THE COURT
OF CRIMINAL APPEALS OF ALABAMA

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BRIEF OF PETITIONER

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ATTORNEYS FOR PETITIONER

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QUESTIONS PRESENTED

!. Were the Petitioner's due process rights violated when the basis of his conviction was the uncorroborated testimony of an accomplice?

2. Were the Petitioner's due process rights violated when evidence of a separate and distinct offense was admitted at trial?

PARTIES

In the Circuit Court of Etowah County, Alabama; the Court of Criminal Appeals of Alabama and the Supreme Court of Alabama, the parties were: The State of Alabama, who is the Respondent herein and Harvey D. Holloway, who is the Petitioner herein.

The matters at issue here were first raised in the Circuit Court of Etowah County, Alabama, and have been at issue throughout these proceedings.

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OPINIONS BELOW

The decision of the Court of Criminal Appeals of Alabama affirming the Petitioner's conviction was issued on April 24, 1984, without opinion. Appendix "A".

The decision of the Alabama Supreme Court denying the Petitioner's writ of certiorari was rendered on July 13, 1984, without opinion. Appendix "B".

JURISDICTION

The order of the Supreme Court of Alabama wherein the writ of certiorari was denied was issued on July 13, 1984 and this petition is filed within sixty days of that date.

The jurisdiction of this Honorable Court is invoked under 28 United States Code, Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved in Petitioners writ include the Fifth Amendment to the Constitution of the United States and the Fourteenth Amendment to the Constitution of the United States. A copy of these amendments are submitted as Appendix "C" to this petition.

STATUTORY PROVISIONS INVOLVED

The Alabama statute involved in the instant case is ¢ 12-21-222, Code of Alabama, 1975 regarding corroboration of an accomplice's testimony. A copy of this provision is submitted as Appendix "D" to this petition.

STATEMENT OF THE CASE AND FACTS

I

The Petitioner was tried on a charge of trafficking in cannabis and was found guilty. A sentence of twenty years in the state penal system and a fine of $25,000.00 was imposed. An appeal followed to the Alabama Court of Criminal Appeals.

The basis of Petitioner's appeal was two-pronged. Initially, the Petitioner raised the issue that his Fifth Amendment due process rights were violated when his conviction was allowed to stand on the uncorroborated testimony of an accomplice. Secondly, the Petitioner alleged that his due process rights were violated when evidence was admitted pertaining to a separate and distinct controlled substance offense.

On April 24, 1984, the Court of Criminal Appeals of Alabama affirmed the conviction of the Circuit Court, without opinion. An application for rehearing and rule 39(k) motion was filed in the Court of Criminal Appeals raising the same issues and was denied without opinion on May 8, 1984.

Appendix "A"

Mr. Holloway then petitioned the Supreme Court of Alabama for a writ of certiorari alleging substantially the same issues. The petition was denied without opinion on July 13, 1984.

II

The petition is based on the following facts:

The Petitioner was observed by Sherriff's Deputies as a passenger in a car driven by Mr. Bolding. At one point the officers

observed Mr. Holloway approach a trailer and speak to two men. The men then followed Mr. Bolding's car and subsequently it stopped and several men took large bags from the trunk which was later determined to be marijuana. Throughout the exchange the Petitioner continued to occupy the passenger side of Mr. Bolding's car.

At trial Mr. Bolding gave the only testimony that linked Mr. Holloway with the marijuana. On rebuttal the State offered evidence to show that an old, inoperable car of the Petitioner's that was on Mr. Bolding's property in another county also contained marijuana.

SUMMARY OF THE ARGUMENT

The Petitioner contends that his Fifth and Fourteenth Amendment due process rights were violated when his conviction was grounded on the uncorroborated testimony of an accomplice. An Alabama statute specifically prohibits a conviction had on the testimony of an accomplice unless it is corroborated by other, independent evidence. Without the testimony of the accomplice in the present case the Petitioner could not have been found guilty of trafficking in cannibis under Alabama law.

Furthermore, on rebuttal the State introduced evidence that the Petitioner had an old car on land owned by the accomplice and after being told this by the accomplice the police found marijuana

in the trunk of the car. Both Alabama and Federal law prohibit the introduction of evidence concerning an unrelated separate criminal act.

This ruling is based on the promise that such evidence is highly prejudicial to a defendant and causes the jury to base their verdict on facts unrelated to the crime charged.

ARGUMENT

I

The Petitioner, Harvey D. Holloway, respectfully submits to this Honorable Court that his due process rights under the Fifth and Fourteenth Amendments to the Constitution of the United States were denied him during the trial of the instant case. The specific contention made by the Petitioner is that his conviction was based soley on the uncorroborated testimony of an accomplice.

Code of Alabama, 1975, § 12-21-222, provides the following guidelines for corroborating an accomplice's testimony:

> " A conviction of a felony cannot be had on the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense, and such corroborative evidence, if it merely shows the commission of the offense or the circumstances

thereof, is not sufficient."

Mr. Holloway contends to this court that the requirements of the above statute have not been complied with.

The evidence presented by the State during their case in chief consisted of the testimony of the accomplice Billy Bolding, Deputy Sherriff Johnny Grant and ABC Board agent James Buttram. Bolding testified that he had previously been tried and convicted in this case and that although he was driving his own automobile it was the Petitioner who placed the sacks of marijuana in the trunk and directed him where to drive. Bolding acknowledged that he knew the sacks contained marijuana. The testimony of Officer Grant and Mr. Buttram merely stated that they observed Mr. Holloway as a passenger in Bolding's car and that they followed the car while

it was in Gasden. The only testimony placing Mr. Holloway in possession of the marijuana was that of Billy Bolding, whose testimony in and of itself is insufficient to support the conviction.

In determining that Bolding is in fact an accomplice we only have to see that he was tried and convicted of the same offense and the district attorney referred to him as a " co-conspirator " and treated him as such during the course of the trial.

To determine whether Bolding's testimony was corroborated it is necessary to eliminate Bolding's evidence and evaluate the remaining testimony. McCoy v. State, 397 So.2d 577 (Ala.Cr.App. 1981). The two remaining state's witnesses could only place the Petitioner as a passenger in

Bolding's car and their testimony does not further implicate Mr. Holloway. Their tesimony cannot place him in possession of the marijuana as alleged in the indictment.

In McCoy v. State, supra, the Alabama Court of Criminal Appeals reversed and rendered a case wherein they determined that without the testimony of the accomplice the remaining evidence was not sufficient to support a conviction for arson. The court likened our §§ 12-21-222, Code of Alabama, 1975, to an identical statute in Oklahoma and cited with approval Faye v. State, 606 P.2d 599 (Okl.Cr. 1980). The Faye case held that corroborative evidence was not sufficient if any of the accomplice's testimony is needed to "form the link" between the accused and the crime he is charged with.

It is certainly apparent in the instant case that without the accomplice's testimony to "link" Mr. Holloway to the crime charged the State could never have made a prima facie case. It is axiomatic under Alabama law that the mere presence of a person in a car other than his own, where drugs were found is not sufficient to establish the fact that the defendant had knowledge of the drugs. Pryor v. State, 265 So.2d 907 (Ala.Cr.App. 1972) It would certainly be even more difficult in the present case to impute Mr. Holloway with the requisite knowledge that there was marijuana in the trunk of the car in which he was riding. Under Alabama law Mr. Holloway could not be held to be in possession of the controlled substance.

The denial of the Petitioner's motion for judgment of aquittal at the close of the State's case was error. In establishing the Petitioner's guilt by way of the uncorroborated evidence of Bolding, Mr. Holloway's due process rights were violated and this court should remedy the encroachment by reversing the case to the Alabama Court of Criminal Appeals with directions to remand for a new trial.

II

The second issue presented for this Court's review involves the violation of the Petitioner's due process rights when evidence pertaining to an offense separate and distinct from the one alleged in the indictment is introduced at trial.

The instant case is concerned with trafficking in a controlled substance and is based on an indictment from Etowah County. Testimony was admitted by the trial judge that the Petitioner had been arrested for possession of marijuana in Marshall County.

In the State's case in chief, the prosecutor attempted to introduce testimony concerning the arrest in Marshall County, but defense counsel's objection was sustained. However, on rebuttal

the trial judge allowed the prosecutor to admit the objectionable evidence.

It has long been well recognized law in Alabama that evidence presented at trial which tends to show a separate and distinct offense from the one charged is inadmissible. Dennison v. State, 17 Ala.App. 674, 88 So. 211 (1921) and Terrell v. State, 397 So.2d 232 (Ala.Cr.App. 1981), writ denied 397 So.2d 235 (Ala. 1981)

The United States Court of Appeals, Fifth Circuit, spoke on this issue in United States v. Turquitt, 557 F.2d 464 (5th Cir. 1977) The defendant was charged with unlawful possession of stolen mail matter, and on rebuttal the government admitted evidence that the defendant had unlawfully sugned a false name to a lease, He had not been convicted of the

second offense. The Court reversed and remanded the case and addressed this issue as follows:

> " Evidence which shows or tends to show commissions of crimes not charged is inadmissible in a trial for a particular crime.' (citations omitted) This rule is necessary to prevent conviction baesd on a jury's belief that the accused is a person of bad character. The jury's determination of guilt or innocence should be based on evidence releavnt to the crime charged."

See also United States v. Labarbera, 581 F.2d 107 (5th Cir. 1978), wherein evidence was intrduced of an unrelated arrest. The Court reversed and remanded calling the evidence concerning the arrest " inadmissible" and "highly prejudicial".

In the case at bar the evidence concerning the separate drug offense was

introduced solely as an inflammatory tactic to prejudice the jury against the appellant. Every defendant comes into court to answer the allegations contained in a particular indictment. Here, the Petitioner was called on to answer the charge of trafficking in marijuana in Etowah County, and instead, after the commencement of the trial, even after the defense had rested, it was evident that he was also, in effect, being tried for trafficking in marijuana in Marshall County. The evidence on the Marshall County arrest was for no purpose than to build a conviction on inferences of guilt of the other separate offense. The great danger to the defendant in situations such as this is to instill in the minds of the jury the inference that since the defendant committed one

crime similar to the one he is charged with he must have committed the one he is on trial for. Furthermore, serious legal issues surround the search and seizure of the marijuana in Marshall County, and the testimony of the search was allowed wihtout an exhaustive investigation into the surrounding questions of what the appellant contends was an illegal seizure. The Petitioner's due prcess rights have been grievously injured by the trial court's action.

CONCLUSION

In conclusion, the Petitioner, Harvey D. Holloway, respectfully submits that the decisions of the Alabama Court of Criminal Appeals and the Supreme Court of Alabama, in affirming the decision of the trial court, have affirmed actions which infringe on the Petitioner's due process rights under the Fifth and Fourteenth Amendments to the Constitution of the United States. For this reason the Petitioner prays that this Honorable Court will issue the writ of certiorari and review the decision of the Courts of Alabama and on such review reverse and remand the instant case.

Arthur J. Hanes, Jr.

ARTHUR J. HANES, JR.
Attorney for Petitioner

Virginia A. Vinson

VIRGINIA A. VINSON
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been mailed to the attorneys for the Respondent, certified mail, this the 10 day of September, 1984, and addressed as follows:

Honorable Charles Graddick
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